

August 30, 1995

P.S. Protest No. 95-21

WECKWORTH MANUFACTURING, INC.

Solicitation No. 198525-95-A-0011

DIGEST

Protest against competitive award to Federal Prison Industries/UNICOR on the grounds that the solicitation already had set aside a certain quantity of the required items for UNICOR is dismissed because the protester, not next in line for award, lacks standing to protest.

DECISION

Weckworth Manufacturing, Inc., (Weckworth) timely protests an award to Federal Prison Industries, Inc.,¹ of a contract to supply canvas inserts for hampers and baskets to postal facilities.

Solicitation 198525-95-A-0011 was issued November 28, 1994, by the Topeka Purchasing Center, Topeka, KS, to a source list consisting of 29 potential offerors. After three amendments, the offer due date was extended to February 24, 1995.

Section A of the solicitation listed two requirements, "Item 01" and "Item 02." The requirements were identical except for a provision stating that item 02 would be a "quantity set-a-side [sic] for UNICOR/FPI":

¹ Federal Prison Industries, Inc., which uses the trade name "UNICOR", is a government-owned corporation established to "provide employment for the greatest number of those inmates in the United States penal and correctional institutions . . . as is reasonably possible . . ., [to] operate the prison shops [so] that no single private industry shall be forced to bear an undue burden of competition from the products of the prison workshops, and to reduce to a minimum competition with private industry or free labor." 18 U.S.C. 4122(b)(1) (1988).

One firm fixed price contract will be awarded for item 01 which will be delivered in accordance with the delivery schedule in Section C. . . .

The Postal Service reserves the right to make an award on item 02 to the Federal Prison Industries/UNICOR, a government corporation. In the event FPI/UNICOR declines to submit [an] offer, the Postal Service intends to make award of item 02 to the successful offeror on item 01.

Section L.7, Certificate of Independent Price Determination, stated in part:

By submitting this proposal, the offeror certifies . . . [that] prices proposed have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to the prices with any other offeror or with any competitor [and] the prices proposed have not been and will not be knowingly disclosed by the offeror before award of a contract, directly or indirectly to any other offeror or to any competitor

Section M.1 stated:

One firm fixed price award will be made to the responsible offeror who submits an acceptable offer in compliance with solicitation terms and conditions and the lowest offer price for Item 01.

One firm fixed price award will be made to UNICOR/FPI for Item 02 in compliance with solicitation terms and conditions.

In the event UNICOR/FPI declines to manufacture the quantity, the Postal Service intends to make award of Item 02 to the successful offeror on Item 01.

Nine offers were received for item 01. Weckworth offered the fifth lowest price; UNICOR offered the second lowest.² The lowest offeror was determined to be nonresponsible, and item 01 was awarded to UNICOR on May 26. This protest followed.

The protest asserts that since the two solicited items are identical and that item 02 was to be set aside for UNICOR, the solicitation clearly contemplated that award of item 01 would go to "private industry--even to the point that it states that the lowest (private industry) bidder on item '01' will also get item '02,' if UNICOR decides not to bid it."

The protester also claims that it had reached an agreement with UNICOR for the latter to be the protester's subcontractor if the protester was awarded item 01. The protester claims that UNICOR's own bid for item 01 violates the Certificate of Independent Price Determination because it had discussed pricing with UNICOR. Weckworth states that it "cannot claim that [it] told [UNICOR] precisely what [its] bid price would be, but did, in order

² UNICOR also submitted an offer for item 02; its unit prices for the two items were the same.

to encourage [UNICOR] to quote as a subcontractor in the first place, tell [UNICOR] that [Weckworth] would only add 'a couple of bucks'" to [UNICOR's] price quoted to Weckworth.

Weckworth also asserts that in various conversations with employees at the Topeka Purchasing Center "[a]t no time did [the employees] give any indication that item '01' could be awarded to UNICOR."

Finally, the protester asserts that Procurement Manual (PM) 3.1.5 provides that "UNICOR can be used when it is determined that their prices are comparable to market prices, as determined by available catalog pricing, or other means used to determine market price, other than the solicitation of bids from private industry."³ The protester interprets this to mean that the fact that other offerors were solicited for item 01 "prevents USPS from using UNICOR as the prime contractor on [that item]." The protester asks that UNICOR be disqualified from competing for item 01 and that the Postal Service award the contract "to the qualified private industry offeror having submitted the lowest bid. . . ."

In his statement in response to the protest, the contracting officer states that UNICOR signed the Certificate of Independent Price Determination and "Weckworth has presented no evidence to indicate that UNICOR's certificate was false." The contracting officer asserts that the protester "merely points out that UNICOR has both submitted a proposal to Weckworth to provide the canvas inserts to Weckworth and has submitted a proposal to the Postal Service as well." He points out that "Weckworth's own statements indicate that it did not communicate its actual price to UNICOR" and that "neither UNICOR nor Weckworth acted in any way to restrict competition."

The contracting officer cites *Sanimasters, Inc.*, P.S. Protest No. 93-09, August 2, 1993, dismissing a protest which claimed that the awardee, like UNICOR here, had negotiated with the protester as a subcontractor and then had proposed and won the contract himself. The contracting officer states:

³ PM 3.1.1, Priority of Sources, establishes a descending order of priority for obtaining goods and services of which the last item is "Other . . . Government[]" and commercial sources."

PM 3.1.5, Other Government Sources, states, in part:

3.1.5 a. Federal Prison Industries, Inc. (UNICOR)

1. Policy.

(a) It is Postal Service policy to use Federal Prison Industries . . . as a source of supply for:

(1) Mailbag requirements exceeding the capacity of the Mail Equipment Shops; and

(2) Other products and services available from FPI.

(b) Price and delivery terms must be reasonable and competitive with those of commercial sources (as determined by catalog or market prices or other means not involving obtaining competitive proposals).

In our case, UNICOR also proposed to do the work as a subcontractor to Weckworth as well as proposing to the Postal Service in its own name. UNICOR, like [the awardee in *Sanimasters*], knew what its prime contractor/competitor planned to pay it, but did not know the precise proposal price the prime contractor/competitor intended to bid.

The contracting officer also asserts that this protest should be dismissed because "there is no evidence of fraud, bad faith or failure to apply responsibility criteria and therefore the contracting officer's responsibility determination should be upheld," citing *Complete Mobile Wash U.S.A. Inc.*, P.S. Protest No. 90-64, November 15, 1990.

On the issue of UNICOR's eligibility to compete for item 01, the contracting officer makes the following points:

-- The solicitation in no way prohibits UNICOR from competing on item 01.

-- PM 3.1.5 states the circumstances under which UNICOR, a government source for supplies and services, may be solicited without competition. UNICOR's prices for such set-aside procurements must be reasonable in comparison with commercial sources, and contracting officers may determine what is reasonable by researching catalogs or other methods not requiring requesting proposals from the public.

-- If the PM had intended to restrict UNICOR to its be noncompetitive set-asides, and prohibit it from participating in competitive procurements, "it would plainly say so." The intent of this solicitation was to set aside half of the required items for UNICOR and procure the other half competitively from commercial offerors and UNICOR. "UNICOR/FPI has successfully competed with private industry in past procurements for this same item as well as other USPS items."

Finally, the contracting officer asserts that Weckworth's protest should be dismissed because Weckworth lacks standing as an interested party due to its having offered the fifth lowest price, which makes it ineligible for award were its protest upheld, citing *Strapex Corporation*, P.S. Protest No. 85-33, July 11, 1985.

DISCUSSION

We first address the matter of Weckworth's standing to protest award to UNICOR. The contracting officer is correct that Weckworth lacks standing with respect to issues which, even if resolved favorably to the protester, would not result in its receiving the award. *Cabletron Systems, Inc.*, P.S. Protest No. 93-23, December 23, 1993. Since the protester offered the fifth lowest price, it would not be next in line for award if UNICOR is disqualified.⁴

⁴ Although the contracting officer made no responsibility determinations concerning the two offerors which were ranked between UNICOR and Weckworth, since he found UNICOR responsible, the record does not suggest and the protester has not raised any basis to find either offeror nonresponsible.

We address the merits of the protest briefly. Nothing in the solicitation prevents UNICOR from offering on item 01, and the protester's arguments interpret Section M.1, quoted above, out of context. The solicitation reserved the quantities listed under item 02 for UNICOR; it did not reserve the rest, listed under item 01, for any particular offerer. Since "item 02" was differentiated from "item 01" only to ensure that UNICOR would supply at least some of the required quantity if it desired to and offered reasonable and competitive terms, no occasion would arise for UNICOR to receive award for item 01 while not receiving award for item 02. The protester's contention that PM 3.1.5 a. precludes UNICOR's competition with other commercial sources is incorrect.

Weckworth further alleges that UNICOR gained an unfair advantage because it knew what Weckworth's price offer would be since it had agreed to be the protester's subcontractor, and that UNICOR's certification of independent price determination was, therefore, false. To the extent that Weckworth complains that the awardee breached a private agreement between itself and Weckworth and thereafter improperly used proprietary information, its protest would not be for consideration by our office. *Complete Mobile Wash U.S.A., Inc., supra.*

As discussed in *Sanimasters, supra.*, the protester's allegation that UNICOR falsified its certification of independent price determination challenges the contracting officer's determination of UNICOR's responsibility. In general, an affirmative finding of responsibility will not be disturbed in the absence of fraud, bad faith, or failure to apply definitive responsibility criteria. See, e.g., *Dataware Systems Lease, Inc.*, P.S. Protest No. 91-41, October 10, 1991. The contracting officer found that UNICOR did not certify falsely and was otherwise responsible, and there is no basis on this record to disturb that finding.

The protest is dismissed.

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